In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 340

J. PAUL SCOTT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. 10-13) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 1964. The petition for a writ of certiorari was filed on August 1, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the record supports the finding of the district court, after a hearing, that petitioner had not shown ineffective assistance of counsel at the time he pleaded guilty.

STATEMENT

On January 31, 1957, in the United States District Court for the Eastern District of Kentucky, petitioner pleaded guilty to two counts of an indictment charging him and others with conspiracy to enter, and entry of, a federally insured bank with intent to commit larceny therein (R. 8).[1] He was sentenced to imprisonment of 5 years on one count and 20 years on the remaining count, the terms to run concurrently.

The transcript of record at the time of arraignment shows that petitioner assured the court that he was represented by the counsel who accompanied him; that this counsel had carefully explained the charges to him; that he understood them; and that he was freely and voluntarily entering the pleas of his own accord and without inducement of any kind (R. 8, 90). The record also shows that, upon allocution, petitioner stated that he realized the charges were "very serious" and requested leniency (R. 90).

On July 11, 1960, about 3½ years after sentence, petitioner moved to withdraw his pleas of guilty

[1] At the same time a ten-year sentence was imposed (to run consecutively to the terms imposed on the bank robbery counts) upon petitioner's plea of guilty to a second indictment charging theft of guns and ammunition from the United States and possession of two unregistered machine guns.

pursuant to Rule 32(d) of the Federal Rules of Criminal Procedure and 28 U.S.C. 2255, on the ground that, at arraignment, he was denied the effective assistance of counsel, was under the influence of drugs and unable to understand the nature of the proceedings, and that his pleas were obtained by fraud, trickery and deceit. The district court denied the motion without a hearing on the basis of the files and record. The court of appeals affirmed (292 F.2d 49) and this Court denied a petition for a writ of certiorari (368 U.S. 879).

On September 22, 1961, a second motion (filed by petitioner as a motion in arrest of judgment under Rule 34, Federal Rules of Criminal Procedure, attacking the indictment) was treated by the district court as a proceeding pursuant to 28 U.S.C. 2255 and denied. Again the denial was affirmed on appeal (304 F.2d 706) and certiorari denied (371 U.S. 847).

Petitioner brought the present proceeding pursuant to 28 U.S.C. 2255 on February 27, 1963, alleging that he had been denied the effective assistance of counsel as required by the Sixth Amendment at the time of arraignment. The district court appointed counsel to represent petitioner and conducted a hearing (on July 29, 1963) at which evidence was adduced.

Petitioner testified, *inter alia*, that at arraignment he was surprised to see counsel (from his home town) whom his father had brought to the jail to see him twice during the two weeks prior to arraignment (R. 15-16). He said counsel had refused to discuss his case with him and had told him that the purpose of his visit was not to represent him, but to help his-

father reclaim a car used on the night of the robbery (R. 13-14, 23). Petitioner said that at the time of arraignment he had not been told by counsel of the nature of the proceedings or the charges, or the possible penalties (R. 15-16), and that he entered the pleas because of pressure from his father (R. 21). He said that, on the basis of research he had done in prison since incarceration, he was convinced that he had not committed a federal crime because he had merely broken into a bathroom of a building with intent to burglarize an office which incidentally was housed in the same building as a federally insured bank (R. 10, 20, 22-23).

Counsel who had represented petitioner at arraignment testified that, at the time he agreed with petitioner's father to represent petitioner, it was understood that petitioner was guilty and would enter a plea of guilty (R. 37, 39). Petitioner's own story (and that of his brother, a co-defendant) had convinced counsel of petitioner's guilt (R. 37, 38, 39). Counsel had discussed the facts with petitioner during several visits to the jail (R. 34, 35) and, after these discussions and discussions with others (R. 36), had reached the conclusion that petitioner had no valid defense (R. 37, 38). With respect to petitioner's present claim that he intended only to burglarize an office, counsel said this was the first time he had heard the story and added, "The guard was in the bank when he shot him [petitioner]" (R. 39). Counsel stated that he had done no "formal preparation" or research for the case (R. 35, 38). And he acknowledged that, in thirty-one years of law practice, this was the sec-

ond criminal case he had handled in the federal courts (R. 34). He said that he had obtained copies of the indictments "considerably" prior to arraignment and that he had read them. He did not recall specifically reading them to petitioner (R. 32) but he did explain the charges in detail (R. 38). He stressed the seriousness of the crime and advised petitioner of the severe penalties involved (R. 32, 38, 39).

In denying petitioner's motion the district court made specific findings of fact, including the following: that counsel was of petitioner's own choosing; that he was a competent and qualified lawyer of high standing who rendered conscientious assistance as an attorney; and that petitioner understood the charges against him and entered his guilty pleas of his own free will and accord.

ARGUMENT

Petitioner has had an evidentiary hearing on his allegation that he was denied effective assistance of counsel in entering pleas of guilty. The contrary findings of the district court are fully supported by the record.

That court properly concluded that petitioner consented to representation by counsel weeks prior to ar-

The rule has been stated as often as to be almost axiomatic that a charge of ineffective assistance of counsel cannot prevail unless the conduct of counsel is such as to make the proceedings "a farce and a mockery of justice" shocking to the conscience of the court. *See O'Malley v. United States*, 285 F.2d 733, 735 (C.A. 6); *Marshall v. United States*, 259 F.2d 787, 788 (C.A.D.C.), certiorari denied 358 U.S. 850; *Cooper v. United States*, 265 F.2d 686, 687 (C.A. 9).

raignment. There is nothing to show that counsel was not reasonably diligent. There was evidence that he investigated the facts, and that he satisfied himself, both on the basis of his talks with petitioner and by independent investigation, that petitioner had no valid defense. There was also evidence from which the court could conclude that petitioner's belated claim of a valid defense was a manufactured afterthought. Counsel was a practicing attorney of thirty-one years experience. The fact that he had not handled many criminal cases in the federal court obviously does not show incompetence.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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